IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 368 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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SHARDABEN NARENDRAKUMAR MEHTA

Versus

MUKESHBHAI NAGINLAL GANDHI

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Appearance:

1. Civil Revision Application No. 368 of 2002

MR PRADEEP PATEL for Petitioner No. 1

MR BP DALAL for Respondent No. 1-2

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CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 27/11/2002

ORAL JUDGEMENT

#. The petitioner is the original plaintiff of Regular Civil Suit No.206 of 1999, which is filed against the

present respondents. During the pendency of the said suit, on behalf of the present respondents, the application was submitted at Exh.15 on the ground that the petitioner - original plaintiff had filed the earlier suit, being Regular Civil Suit No.95 of 1999 and that since the said suit was withdrawn unconditionally, present suit is barred under the provisions of Order 23, Rule 4 of the Civil Procedure Code. The trail Court accepted that plea of defendants and dismissed the suit by its order dated 31.3.2000. Being aggrieved by the aforesaid order, present petitioner filed Regular Civil Appeal before the Appellate Court. Since there was delay of about 52 - 55 days, an application was submitted on behalf of the petitioner before the Appellate Court to condone the delay. In the delay condonation application, it was submitted that, in view of the circumstances beyond the control of the petitioner, delay in question has occurred, which may be condoned in the interest of justice.

#. The aforesaid application was made available to this Court by the learned advocate for the respondents. The appellate Court, by the impugned order, came to the conclusion that the trial Court was right in passing the impugned order, by which, the suit was dismissed. Accordingly, the Appellate Court has considered the merits of the said appeal. The Appellate Court has observed in para 9 as under :

"That in the present case, the applicant did not obtain permission of the court for filing a fresh suit before the applicant withdraw his original R.C.S.No.95/99. That Clause (b) of Sub rule (4) provides that when plaintiff withdraw the suit or part of claim without permission of the court, he shall be liable for such costs as the court may think and shall be precluded from instituting any fresh suit in respect of such subject for such part of the claim. It is for this reason that sub rule (4) of Rule (1) imposes a bar against more than one suit for the same cause of action after withdrawal of the earlier suit. Therefore if a suit for a cause of action filed has been withdrawn by the plaintiff, then another suit for same cause of action cannot be filed unless the withdrawal is subject to the permission granted by the court for filing another suit. Thus once the suit is withdrawn without court's permission, to file another, bar imposed by the sub clause (b) of Sub Rule (4) of Rule 1 attracted and a fresh suit for the same cause of action on which

previous suit was filed, will be barred.

Thus in view of the above settled legal position and the facts of the present case the present application of the applicant for condonation of delay is hereby deserves to be dismissed. Hence, I pass the following final order."

Accordingly, the application for condonation of delay is rejected by the Appellate Court and the petitioner was ordered to pay compensatory costs of Rs.3000/-. The said order is impugned at the instance of the petitioner herein.

#. I have heard the learned advocate for the petitioner as well as the learned advocate for respondents. I have gone through the order of the learned Appellate Judge, by which, delay condonation application is rejected. After reading entire order of the Appellate Court, I am of the opinion that the Appellate Court has merely discussed the merits of the order passed the learned trial Judge. The Appellate Judge has not discussed, whether the petitioner made out sufficient cause for condonation of delay. The merits of the case is required to be considered provided the delay is condoned and not before that. Till the delay is condoned, the Court is not required to consider the merits of the issue. Since the entire order of the learned Appellate Judge is devoted in discussing the merits of the appeal as well as the merits of the order of the trial Court, in my view, the Appellate Court has failed to exercise the jurisdiction vested in it by law, as, at no point of time, in the entire order, scope of Section 5 of the Limitation Act is discussed by the Appellate Court considering the averments made in the application for condonation of delay and other documents on record for the purpose of finding out sufficient cause. As stated above, till the delay is condoned, the Court is not required to consider merits of the issue. Unfortunately, the Appellate Court has only considered merits of the order passed by the trial Court.

#. So far as the condonation of delay is concerned, the Apex Court, in the case of Collector, Land Acquisition, Anantnag and another Vs Mst.Katiji and others, reported in AIR 1997 SC 1353, has laid down certain principles for deciding the delay condonation applications. The Apex Court has held in para 3 as under.:

"The legislature has conferred the power to condone delay by enacting S.5 of the Indian Limitation Act of 1963 in order to enable the

Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierachy. And such a liberal approach is adopted on principle as it is realized that :-

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay ? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this

> perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the 'State' which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a stepmotherly treatment when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file pushing, and passing-on-the-buck ethos, delay on its part is less difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant non grata status. The Courts therefore have to inform with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even-handed justice on merits in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time barred, is therefore, set aside. Delay is condoned. And the matter is remitted to the High Court. The High Court will now dispose of the appeal on merits after affording reasonable opportunity of hearing to both the sides."

#. In view of the aforesaid aspect of the matter, especially when the Appellate Court has only considered merits of the issue, the said order deserves to be quashed and set aside. Delay in filing the appeal before the Appellate Court is condoned. Accordingly, Misc. Civil Application No.272 of 2000 filed by the petitioner before the Appellate Court is allowed. The appeal of the present petitioner to be decided on merits. Since the present petitioner has not shown vigilance in the matter of pursuing remedy of appeal, the petitioner is directed to pay costs of Rs.5000/- (Rupees five thousand only) in

all to respondents. Such costs to be deposited before the appellate Court within a period of one month from today. The respondents are permitted to withdraw the aforesaid amount unconditionally. Before taking the appeal on merits, the Appellate Court shall ensure that such payment is made. In case, the said amount is not deposited before the Appellate Court within the time as stipulated above, the appeal of the petitioner shall not be taken on merits and the application for condonation of delay shall be treated to have been rejected. If the amount is deposited, the appeal to be decided on merits as indicated above.

#. In view of what is stated above, this revision application is allowed. Rule is made absolute to the extent indicated above with costs, as quantified above.

#. It is clarified that, in view of the above order, the order of compensatory costs is also quashed and set aside.

(P.B.Majmudar,J)
(pathan)